SUPREME COURT, U.S.
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No. 02-139

In The

Supreme Court of the United States

STANLEY A. SAMUEL,

Petitioner,

v.

STATE OF WISCONSIN,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF WISCONSIN

BRIEF FOR RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

When a criminal defendant seeks to suppress an allegedly coerced statement of a witness on Fourteenth Amendment due process grounds, what standard applies in determining whether the statement must be suppressed?

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STATEMENT

The respondent, the State of Wisconsin, provides the following facts because the petitioner, Stanley A. Samuel ("Samuel"), has mischaracterized the key facts necessary to a complete and accurate understanding of what happened in this case.

On January 26, 1996, Tisha, age fifteen at the time, left Oshkosh, Wisconsin, in a car driven by Samuel, age forty-seven at the time, either because Samuel took Tisha away from her mother and father without their consent (the state's view) or because she had been kicked out of her mother's house and had nowhere else to go (Tisha's view). The pair first traveled to Milwaukee, Wisconsin, for a week and then left Wisconsin until March 8, 1997, when police in Missouri stopped them. Tisha's father went to Missouri and brought Tisha back to Wisconsin on March 9, 1997. Samuel was brought back to Wisconsin on March 17 or 18, 1997.

Tisha gave birth to a daughter on March 10, 1997, and Samuel was the father of the baby. On March 12, 1997, a custody hearing was held to determine temporary physical custody for Tisha and her baby. Tisha was placed in the custody of her father, under a temporary physical custody order, and Tisha's baby was placed in the custody of the social services department, with the baby's placement to be determined at an intake conference.

The Intake Conference

On the same day, a child protection intake conference took place, the purpose of which was to determine where the baby should be temporarily placed pending a March 15 hearing in children's court to determine permanent placement. Present at the intake conference were Tisha, her

attorney, David Keck, Social Worker Rodney Schraufnagel, Assistant Corporation Counsel Grant Thomas, Children's Court Intake Worker Kim Threw, and Tisha's social worker, Chris Stanaszak. Tisha's father came in after about ten minutes, and Police Officer Steven Sagmeister came in about halfway through.

Samuel's petition presents a one-sided view of what was said at the intake conference held on March 12, 1997, to determine the temporary placement of Tisha's baby and what was said to Tisha prior to her giving a statement to Officer Sagmeister and Social Worker Schraufnagel on March 13, 1997. As an initial matter, the record establishes that both Tisha's father and Officer Sagmeister agreed that the intake hearing had nothing to do with Samuel's potential criminal charges (9/18/97 Tr. at 34; 12/3/97 Tr. at 17). The focus of the intake meeting was about the events that took place while Tisha and Samuel were on the run (9/18/97 Tr. at 37). The social workers stated more than once that they were concerned that Tisha would leave the state and take shelter with one of Samuel's friends, putting her baby in danger. They were concerned that unless they had some information about where Tisha had been for the past year, with whom she had been staying, what she had done and how she planned to care for her baby, they could not trust her to properly care for her baby (9/18/97 Tr. at 37-38; 12/3/97 Tr. at 74). As a result, the social workers were trying to get Tisha to cooperate in answering questions about those things (9/18/97 Tr. at 38-39).

As the Wisconsin Supreme Court explained, "the [government] authorities involved had a separate legitimate purpose for questioning Tisha with regard to Samuel. They needed to determine the proper placement of her baby, which depended on an assessment of whether she was a flight risk

and whether she could be trusted to properly care for her newborn child." Pet. App. A:19, ¶43.

According to Tisha, she was asked a lot of questions at the intake conference in an effort to get the entire story and was told "[c]ountless times" to cooperate (9/18/97 Tr. at 10-11, 20). Tisha was asked questions about her relationship with Samuel, with whom she had been staying while she was outside the state, and where she had been for the past year (*id.* at 20). Tisha did not answer the questions about her relationship with Samuel because she did not think they were relevant to the placement determination of her daughter (*id.*). According to Tisha, she was told at the intake conference that if she did not cooperate she would not get her baby back (*id.* at 12-13). Tisha claimed that she was told she had to give a statement to police before the March 15 hearing in children's court that was scheduled to determine the baby's permanent placement (*id.* at 13-14).

Tisha added that although she was never directly told "to give Stanley Samuel up, get him in trouble," she was indirectly told to do so (*id.* at 25-26). Tisha stated that she thought she was not given temporary custody of her baby at the conclusion of the intake conference because she refused to tell the authorities what they wanted to hear (*id.* at 16, 30-31). After talking with her father, Tisha decided she would "tell them whatever they deemed worthy . . . what they thought happened, or just whatever they wanted" in order to get her child back (*id.* at 31).

The Wisconsin Supreme Court found it telling that "Tisha's testimony focused on the fact that she was repeatedly told she had to 'cooperate' in general." Pet. App. A:18, ¶41. The Court noted that despite the fact she testified someone told her she would not get her baby back until she implicated Samuel, "when pressed, she could not

remember who had said this or whether those were the exact words the speaker had used." *Id.*

The testimony of other individuals regarding what transpired at the intake conference was conflicting. Tisha's father testified that the government employees at the intake conference were concerned that if Tisha did not cooperate by providing names of people she had come into contact with while on the run, their phone numbers and locations, they felt they could not trust her with placement of the baby because they feared she might run away with the baby to one of those unnamed locations (9/18/97 Tr. at 37-38). Tisha's father added that it was his impression Tisha was scared that if she did not give a statement, she would not get her baby back (*id.* at 37). The Wisconsin Supreme Court explained in its decision that "Tisha's father testified that neither Officer Sagmeister nor the social worker, Schraufnagel, told Tisha that she needed to say anything in particular in order to get her baby back." Pet. App. A:18, ¶41.

Tisha's attorney testified that it was his personal impression that Tisha had to give a statement to police regarding the criminal prosecution against Samuel in order to get her baby back, but that there were no threats made to Tisha about her baby in exchange for her cooperation (9/18/97 Tr. at 47).

Social Worker Rodney Schraufnagel testified at trial that the purpose of the intake conference was to determine whether Tisha had an appropriate plan for taking care of the baby and whether the baby should be placed with her because there was concern that she would run away (12/3/97 Tr. at 74). Schraufnagel testified that Tisha was not told that she had to give a statement to police before the next scheduled hearing in order for the baby to be placed with her (*id.* at 111-14). Tisha was told that she needed to cooperate

in providing information about the quality of prenatal care she had provided to the baby and her future plans for caring for the baby (*id.* at 75-76). Schraufnagel told Tisha he would try to meet with her again the next day to get this information from Tisha before the next scheduled hearing with the court on March 15, 1997 (*id.* at 77-78). Schraufnagel denied telling Tisha's father what Tisha needed to say or what topics needed to be discussed, and only told him that they needed her cooperation in providing information so that they could better understand what had happened to her while she was on the run (*id.* at 115-16).

After reviewing this tangled factual record, the circuit court concluded that Tisha "was not told what to say but just to cooperate here." Pet. App. C:2. Tisha did not receive temporary placement of her baby at the end of the intake conference (12/3/97 Tr. at 75-76). The baby was placed in a foster home at the direction of juvenile court intake and social services (9/18/97 Tr. at 10-11, 14; 12/3/97 Tr. at 16-17).

Other Pre-trial Proceedings

Officer Sagmeister and Social Worker Schraufnagel met with Tisha on March 13, 1997, to try and get the information from her that she had failed to provide the day before. Tisha gave a tape-recorded statement to Sagmeister and Schraufnagel that established that she and Samuel had a sexual relationship while in Wisconsin, meaning at a time when she was fifteen years old (9/18/97 Tr. at 15-16, 23-25). During this meeting, Sagmeister and Schraufnagel did not tell Tisha what she had to say (12/3/97 Tr. at 18, 20, 79-80).

As the Wisconsin Supreme Court explained, "the record does not show that the authorities ever expressly threatened Tisha with the loss of her baby, although that was

a possibility regardless of whether Tisha implicated Samuel." Pet.-App. A:18-19, ¶42. Moreover, the Court found "little if any credible evidence that Tisha was specifically coached on what to say or that the authorities' questions were blatantly tailored in order to compel her to implicate Samuel." Pet. App. A:18, ¶41.

On March 14, 1997, a hearing was held in front of the court commissioner of the children's court to determine the placement of the baby. The department of social services recommended that Tisha and the baby be together, and both Tisha and the baby were placed with Tisha's parents. After the hearing, Tisha gave a second tape-recorded statement because the tape recording from the day before did not turn out.

Samuel is correct that Tisha did not receive temporary placement of her baby at the end of the intake conference—the baby was placed in a foster home—and that her baby was then placed with her on March 14, 1997, after Tisha had provided a statement to Officer Sagmeister and Social Worker Schraufnagel establishing that she and Samuel had a sexual relationship before they left Wisconsin. Pet. at 3-4. However, Samuel provides a one-sided view of the rationale behind the removal and return of Tisha's baby. Samuel's petition suggests that Tisha's baby was placed in foster care because she did not provide any information against Samuel, and was returned to her because she provided a statement against him. Pet. at 3-4.

None of the courts that have heard or reviewed this case, however, have adopted that characterization of the facts. The courts have instead recognized (as noted above) the need for the social workers to make "an assessment of whether she was a flight risk and whether she could be trusted to care properly for her newborn." Pet. App. A:19,

¶43. When Tisha failed to answer questions about where she had been, with whom she had been staying, what she had done, who was the father of her child, and how she planned to care for the baby, the social workers were given no basis to believe that Tisha could be trusted with her child. As a result, social services and the children's court intake directed that the baby be placed in a foster home (9/18/97 Tr. at 10-11, 14; 12/3/97 Tr. at 16, 74-78).

Although it is true that Tisha's baby was returned on March 14, 1997, after she had provided an incriminating statement against Samuel establishing that they had had a sexual relationship before leaving Wisconsin, the record does not support Samuel's suggestion that the baby was returned *because* she had provided an incriminating statement. In her statement to Sagmeister and Schraufnagel the day before, Tisha had answered some of the questions she had refused to answer at the intake conference (12/3/97 Tr. at 78-81), which filled in some of the gaps and provided a basis to trust that Tisha could properly care for her baby. Moreover, the return of Tisha's baby followed a custody hearing in front of a court commissioner at which the department of social services recommended that Tisha and her baby be together (*id.* at 19-20, 57, 82).

As the Wisconsin Supreme Court explained, "[t]he record does not show that anyone presented Tisha with an illegal quid pro quo, such as a promise that she would be able to keep her baby if she agreed to implicate Samuel." Pet.-App. A:19, ¶42.

On March 21, 1997, Tisha provided a written statement to the police officer and social worker at her home. The contents of this written statement were consistent with her earlier taped statements establishing that Tisha and

Samuel became sexually active in September 1995, before they left Winnebago County, Wisconsin.

Proceedings Before the Trial Court

Prior to trial, Samuel moved to suppress Tisha's statements to Officer Sagmeister and Social Worker Schraufnagel on the grounds they were coerced. The trial court denied the motion. Pet. App. D.

At trial, Tisha testified that the first time she and Samuel had sex was in March or April 1996, after they had left Winnebago County, Wisconsin, which was inconsistent with her prior statements to Officer Sagmeister and Social Worker Schraufnagel. The prosecutor impeached Tisha at trial with her prior inconsistent statements to police that had established a sexual relationship with Samuel in Wisconsin in 1995. Tisha testified that she was coerced into making a false statement because she thought that is what she needed to do to have her baby returned to her.

Prosecutors responded by putting before the jury the circumstances surrounding the giving of Tisha's prior inconsistent statements about when she had sex with Samuel. Several witnesses testified on this point, including Tisha, her father, her stepmother Cathy Stelzner, Sagmeister and Schraufnagel.

Following his conviction on all three counts, Samuel filed a postconviction motion in which he reasserted his claim that Tisha's statements to police were coerced and should have been suppressed. Samuel claimed that the admission of Tisha's coerced statements at trial violated his due process rights.

The state responded to Samuel's postconviction motion by arguing that the constitution protects defendants from the state's use of the defendant's coerced confession, but that the protection does not extend to witnesses who gave a statement against a defendant. The state argued that rather than suppressing the allegedly coerced statements, the better procedure was to put the circumstances surrounding the giving of the allegedly coerced statement before the jury.

At the conclusion of the postconviction motion hearing, the trial court denied Samuel's motion, finding that the cases Samuel cited in his brief dealt with co-defendants, not witnesses, and no due process issue was raised by the use of Tisha's statement at trial. Pet. App. C:1. The trial court held that when it is a witness's statement at issue, not a defendant's, the statement is not subject to suppression. Instead, the statement comes in and is subject to cross-examination to allow the jury to decide whether the statement is reliable. Pet. App. C:2. Moreover, the trial court found that "in this case, in all honesty, the Court wouldn't be able to even find coercion." Pet. App. C:1.

Appellate Proceedings

In its December 27, 2000 decision, the Wisconsin Court of Appeals concluded that Samuel had "standing" to object to the admission of Tisha's prior statement on grounds that Tisha's statement was coerced. Pet. App. B:1, ¶1. The court of appeals held that the defendant's due process rights require suppression of a witness's statement if the statement is found to be involuntary under the test used to evaluate the voluntariness of a defendant's allegedly coerced confession. Pet. App. B:10, ¶¶20-21. The court of appeals reversed Samuel's sexual assault conviction and remanded the matter to the trial court for an evidentiary hearing to determine if Tisha's statement was voluntary. Pet. App. B:12, ¶23.

The Wisconsin Supreme Court reversed the court of appeals decision and unanimously agreed on the standard to be applied in determining whether a criminal defendant's due process rights require suppression of a witness's allegedly involuntary statement: "the police misconduct must be more than that [required under the standard for suppression of a defendant's confession]. It must be egregious such that it produces statements that are unreliable as a matter of law." Pet. App. A:12, ¶30. The Wisconsin Supreme Court articulated a non-exclusive list of six factors to be considered in determining whether police misconduct is egregious such that it produces statements that are unreliable as a matter of law: (1) whether a witness was coached on what to say; (2) whether investigating authorities asked questions blatantly tailored to extract a particular answer; (3) whether the authorities made a threat with consequences that would be unlawful if carried out; (4) whether the witness was given an express and unlawful quid pro quo; (5) whether the State had a separate legitimate purpose for its conduct; and (6) whether the witness was represented by an attorney at the time of the coercion or statement. Pet. App. A:13, ¶31. The Court explained that "[t]he presence of the first four factors weighs in favor of suppression while the presence of the second two factors weighs against it." Pet. App. A:13, ¶31.

Applying those factors to the facts of this case, the majority of the Wisconsin Supreme Court concluded that Tisha's statements should not have been suppressed because "[n]o reasonable view of the evidence can support the conclusion that Tisha's statements were coerced by egregious methods that produced statements unreliable as a matter of law." Pet. App. A:17, ¶40.

Samuel's petition mischaracterizes the Wisconsin Supreme Court's application of these factors by claiming that

"[t]he Court then held that the agents' taking of Tisha's newborn child pending Tisha's 'cooperation' *with the prosecution of Samuel* failed to meet its new standard for suppression." Pet. at 12 (emphasis added). At no point in its decision did the Court determine that the "cooperation" that was requested of Tisha was cooperation *with Samuel's prosecution.*

REASONS FOR DENYING THE PETITION

I. The Standard Adopted By The Wisconsin Supreme Court Does Not Create A Conflict That Warrants This Court's Review.

To the extent that Samuel relies upon a conflict or "confusion" among the Wisconsin state courts (Pet. 13-14), that is not a proper basis for this Court's review. Any "confusion" by the courts in Wisconsin about the proper standard to be applied when a defendant seeks suppression of a witness's allegedly coerced statement on due process grounds has been eliminated by the thorough, well-reasoned, and unanimous decision of the Wisconsin Supreme Court holding that the appropriate standard is whether there was egregious police misconduct rendering the statement unreliable as a matter of law. Pet. App. A:12, ¶30. The decision of the Wisconsin Supreme Court provides a proper, constitutionally sound standard to direct Wisconsin courts on this issue. Moreover, the Wisconsin Supreme Court provided a list of factors to be considered in applying the standard it adopted which eliminates any confusion as to how the standard is to be applied. Pet. App. A:13-14, ¶¶31-32.

Samuel correctly asserts that several United States Courts of Appeals and the Alaska Supreme Court have recognized a criminal defendant's standing to assert a due

process violation based on the coercion of witnesses whose statements are used against the defendant at trial.[1] Pet. at 14-15. But contrary to what Samuel's petition would suggest, only one United States Court of Appeals, the Tenth Circuit in *United States v. Gonzales*, 164 F.3d 1285, 1289 n.1 (10th Cir. 1999), and no state court of last resort, other than Wisconsin, has squarely addressed the question of what standard applies in determining whether a defendant's due process rights require suppression of a witness's allegedly coerced statement.

In *Gonzales*, the Tenth Circuit applied the same voluntariness standard used to assess the voluntariness of a defendant's confession to determine whether the witness's statements were coerced. 164 F.3d at 1289. In a footnote, the court explicitly rejected the government's argument that a witness's statement is subject to suppression only if it was the product of torture or extreme coercion beyond the level of coercion required for suppression of a defendant's own confession. *Id.* at 1289 n.1. However, the Tenth Circuit does not appear to have considered the legal standard adopted by the Wisconsin Supreme Court. *Id.* at 1289.

In *Clanton v. Cooper*, 129 F.3d 1147, 1158-59 (10th Cir. 1997), and *Raphael v. State*, 994 P.2d 1004, 1008 (Alaska 2000), cases Samuel cites as "courts which seriously considered the issue" (Pet. at 17-18), the courts simply applied the same voluntariness standard to a witness's allegedly coerced statement as applies to a defendant's

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[1] Contrary to Samuel's assertion, the State did not concede below that a defendant has a due process right to *suppression* of coerced witness statements. Pet. at 14. Rather, the State conceded that courts have recognized a defendant has a due process right to *assert* that a witness's coerced statements should be suppressed. The State maintained that due process required suppression only if the witness's statement was the product of extreme coercion or torture. *See* Pet. App. A:7, ¶¶17-18.

confession without analyzing the appropriateness of applying that standard to a witness's statement. In both cases, the courts stated general propositions about the unreliability of coerced statements, and the impropriety and offensiveness of coercing statements from witnesses, but did not actually consider the question of what standard should be applied in assessing the voluntariness of the witness's statement. Nor did the courts consider the different rights involved and purposes served by suppression when a defendant seeks to suppress the statement of a witness as opposed to seeking suppression of his or her own confession. *Clanton*, 129 F.3d at 1157-58; *Raphael*, 994 P.2d at 1007-1008. Moreover, since *Clanton* is simply another Tenth Circuit case, Samuel can only show one other federal court of appeals or state supreme court—the Alaska Supreme Court—that has applied the voluntariness standard to a witness's allegedly coerced statement, and it is not clear that the issue of what standard should be applied to a witness's statement was even briefed.

In support of his claim that review by this Court is warranted to remedy the confusion over what the applicable due process standard is for assessing when a coerced witness statement must be suppressed, Samuel cites decisions from other courts that have upheld admission of coerced, involuntary witness statements when used purely for impeachment purposes. Pet. at 16, 18-19 (citing *Wilcox v. Ford*, 813 F.2d 1140, 1149 (11th Cir.), *cert. denied*, 484 U.S. 925 (1987); *Pinder v. State*, 520 A.2d 1101, 1106-1107 (Md. Ct. Spec. App. 1987); *State v. Vargas*, 420 A.2d 809, 814-15 (R.I. 1980)). However, the fact that those courts allowed the admission of coerced, involuntary witness statements for impeachment purposes is insignificant to the question presented in this case, and does not warrant review by this Court. In none of those cases did the courts address the question of what standard applies in determining whether a defendant's due process rights require suppression of an

allegedly coerced witness statement. Moreover, in none of those cases did the courts limit the use of the witness's coerced prior inconsistent statement to impeachment *because of* any concern that a defendant's due process rights would be violated if the statement was used as substantive evidence.

Similarly, the two cases Samuel cites for the opposite conclusion, that the use of coerced, involuntary witness statements for impeachment violates due process, did not squarely address the question of what standard applies, and dealt with the issue of whether a hearing was required on the issue of voluntariness before the statement could be used for impeachment. *LaFrance v. Bohlinger*, 499 F.2d 29 (1st Cir. 1974); *Vargas v. Brown*, 512 F. Supp. 271 (D. R.I. 1981). Moreover, *LaFrance* is 28 years old, and *Vargas* is a federal district court case. Thus, none of these cases is in direct conflict with the Wisconsin Supreme Court's decision in this case and they do not provide a basis for this Court's review.

Because so few United States Courts of Appeals and state courts of last resort have squarely addressed the question of what standard is to be applied in determining whether a defendant's due process rights require suppression of an allegedly coerced witness statement, review by this Court is not warranted. It appears that no federal court of appeals or other state supreme court has considered and *rejected* a standard similar to that enunciated by the Wisconsin Supreme Court. As a result, further litigation in the lower courts would be helpful to a full and fair analysis by this Court.

II. Certiorari Should Not Be Granted Because Samuel Loses No Matter Which Standard Is Applied.

Review is not warranted because resolution of the alleged conflict over the standard to be applied in determining whether a defendant's due process rights require suppression of a witness's allegedly coerced statement is irrelevant to the ultimate outcome of this case. As already determined by the Wisconsin Supreme Court, Samuel cannot prevail under the "egregious police misconduct" standard enunciated by that court. Pet. App. A:17-19, ¶¶40-43. Moreover, the circuit court that considered Samuel's postconviction motion stated that "in this case, in all honesty, the Court wouldn't be able to even find coercion." Pet. App. C:1 (quoted in Pet. App. A:17, ¶40). The circuit court explained that "[i]t was [Tisha's] acts for which the child was initially taken into custody . . . it was her acts beforehand which led to originally there being an issue as to whether the child would remain with her or not." Pet. App. C:1-2 (quoted in Pet. App. A:17, ¶40). The circuit court found that Tisha was not told specifically what to say, but only to cooperate, and there was no threat that she had to say something in particular in order for her baby to be placed with her. Pet. App. C: 1-2. The circuit court found the facts of this case to be "totally different" from a situation where the police tell a mother that if she doesn't tell them what they want to hear, they are taking her child. Pet. App. C:1. In the absence of police coercion, Tisha's statements must be considered voluntary even under the standard applicable to a defendant's confession. *See Colorado v. Connelly*, 479 U.S. 157, 167 (1986) (coercive police activity is a necessary predicate to finding that a defendant's confession is not voluntary within meaning of due process clause of Fourteenth Amendment). Samuel loses under both the "egregious police misconduct" standard enunciated by the

Wisconsin Supreme Court and the coerced confession voluntariness standard applied by the other courts with which he claims the Wisconsin Supreme Court's decision is in conflict. As a result, this case is not appropriate for review.

III. The Wisconsin Supreme Court's Decision Is Correct.

The Wisconsin Supreme Court concluded that the appropriate standard to be applied in determining whether a defendant's due process rights require suppression of an allegedly coerced witness statement is whether there was egregious police misconduct rendering the statement unreliable as a matter of law. Pet. App. A:12, ¶30. The Wisconsin Supreme Court arrived at this correct conclusion after carefully considering and rejecting both the state's proffered "extreme coercion or torture" standard and Samuel's contention that witness statements should be suppressed based on the same standard as applied to a defendant's confession. Pet. App. A:6-13, ¶¶16-30. The Court concluded that neither standard struck "the proper balance between the Fourteenth Amendment's guarantee of due process and the fact that witness statements that are in some sense compelled are frequently neither unreliable nor the product of egregious police misconduct." Pet. App. A:6, ¶16.

The Court rejected the State's proffered "extreme coercion or torture" standard as setting the bar too high to satisfy due process, determining that due process could require suppression of statements derived by police misconduct falling short of extreme coercion or torture. Pet. App. A:7, ¶18.

In rejecting the standard advanced by Samuel, that witness statements should be suppressed based on the same standard as applies to a defendant's confession, the Court properly considered the different rights protected and the purposes served by suppression of involuntary confessions as compared to suppression of involuntary witness statements. Pet. App. A:8-9, ¶¶19-23. As the Court explained, the rule requiring suppression of involuntary confessions is grounded in both the defendant's due process rights and the defendant's right against self-incrimination. Pet. App. A:8, ¶20 (citing *Brown v. Mississippi*, 297 U.S. 278, 286, (1936), *Malloy v. Hogan*, 378 U.S. 1, 7, (1964) and *Miranda v. Arizona*, 384 U.S. 436, 464 n.43, (1966)). The state should not be allowed to produce evidence against the accused by compelling it from the accused's own mouth rather than by its own independent labors. *Miranda*, 384 U.S. at 460. As the Court explained, when the defendant seeks to suppress a witness's coerced statement, there is no concern that the defendant is being compelled to aid the state in convicting him with evidence from his own mouth—the defendant's right against self-incrimination is not at issue. Pet. App. A:8-9, 12, ¶¶22, 29.

The Wisconsin Supreme Court correctly concluded that when it is a witness's allegedly coerced statement that the defendant seeks to suppress, something more than the voluntariness standard applied to a defendant's own confession is appropriate. When a defendant seeks suppression of a witness's statement, the defendant has the safeguard of cross-examination to bring out all of the circumstances surrounding the giving of the statement to allow the jury to assess the weight and credibility of the allegedly coerced statement. This differs from the situation where a defendant seeks to suppress his or her own confession because a defendant has an absolute privilege against self-incrimination and would have to give up that right in order to show that his or her confession was coerced.

Samuel contends that the Wisconsin Supreme Court's decision leaves undefined "exactly what is required over and above the types of egregious governmental coercion already required under the traditional due process standard." Pet. at 17. Samuel apparently characterizes the standard of voluntariness that applies to a defendant's confession as the "traditional due process standard." *Id.* Contrary to Samuel's contention, the Wisconsin Supreme Court's decision does not leave undefined what constitutes "egregious" police misconduct under the standard adopted. The Court provides a list of six factors to consider in determining whether police misconduct is egregious such that it produces statements that are unreliable as a matter of law, factors that provide guidance to police, courts, and attorneys. Pet. App. A:13, ¶31. As a result, this Court's review is not warranted to remedy any "confusion," as Samuel claims. Pet. at 16.

Furthermore, Samuel's suggestion that the facts of *Lynumn v. Illinois*, 372 U.S. 528 (1963), are similar to the facts of this case is misplaced. As an initial matter, it must be noted that *Lynumn* involved a *defendant* seeking to suppress her own confession—not a defendant seeking to suppress a witness's statement. As the Wisconsin Supreme Court explained in its decision, there are different rights and protections involved when a defendant seeks to suppress her own confession, as opposed to seeking suppression of a witness's statement. Moreover, Samuel incorrectly equates the police misconduct of preying on the defendant's maternal instinct condemned by this court in *Lynumn* with what happened in this case.

In *Lynumn*, 372 U.S. at 533-34, police made an *express* threat to the suspect that her children would be taken away from her and her state financial aid would be cut off if she did not confess to the crime. The police specifically told her what she needed to say—that she sold drugs—if she

wanted to see her kids again. *Id.* at 531-32. Here, there was not an express threat that Tisha would lose custody of her baby, and Tisha was not told she had to say anything in particular to keep her baby or get her baby back. Pet. App. A:18-19, ¶¶41-42. Moreover, in *Lynumn*, there was no evidence of separate, legitimate, on-going child custody and placement determinations as there were in this case. The child custody and placement proceedings, aimed at determining the proper placement of Tisha's baby, provided a legitimate basis for questioning Tisha about her fitness as a parent for her baby. Pet. App. A:19, ¶43.

This Court's review is not warranted because the Wisconsin Supreme Court correctly decided what standard should be applied in determining whether a defendant's due process rights require suppression of an allegedly coerced witness statement after a detailed analysis of the inherent differences between admission of a defendant's coerced confession and admission of a witness's coerced statement. Other state and federal courts that are faced with this question can benefit from the Wisconsin Supreme Court's analysis in this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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